

FILED

SEP 10 2007

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT**

MARTIN F. WIESNER
1622 N. McKinley Rd. #5
Arlington, VA 22205
(703) 909-5055

Plaintiff,

v.

Case: 1:07-cv-01599
Assigned To : Walton, Reggie B.
Assign. Date : 9/7/2007
Description: FOIA/Privacy Act

FEDERAL BUREAU OF INVESTIGATION
935 Pennsylvania Avenue, NW
Washington, DC 20535

and

CENTRAL INTELLIGENCE AGENCY
Washington, DC 20505

Defendants.

COMPLAINT

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, for injunctive and other appropriate relief and seeking the disclosure and release of agency records improperly withheld from plaintiff by defendant Federal Bureau of Investigation ("FBI"), and defendant Central Intelligence Agency ("CIA").

Jurisdiction and Venue

2. This court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district

under 5 U.S.C. § 552(a)(4)(B).

3. Plaintiff Martin F. Wiesner is a citizen of the United States of America, and a resident of the state of Virginia.
4. Defendant FBI is a component of the Department of Justice ("DOJ"). The DOJ is a Department of the Executive Branch of the United States Government, and an agency within the meaning of 5 U.S.C. § 552(f).
5. Defendant CIA is an independent agency of the United States Government. The CIA is an agency within the meaning of 5 U.S.C. § 552(f).

Statement of Facts

6. On February 9, 2006, by separate letters to FBI and CIA, plaintiff submitted Freedom of Information Act ("FOIA") requests for copies of all information maintained about himself. These actions stemmed from plaintiff's involvement on a website, dating from September 21, 2002, where he discussed materials and methods used in suicide bombings, opposition to military action in Iraq, the impeachment of President Bush, and the 2002 DC area sniper shootings.
7. By form of letter to plaintiff dated February 28, 2006, the FBI denied locating any records responsive to a search of the automated indices to the central records system files at FBI headquarters. Notification of entitlement to file an appeal was included in the letter.
8. By letter dated April 13, 2006, attorney for the plaintiff appealed the FBI's response,

citing all available information necessary to locate plaintiff's records, including: name of the website, all aliases used by plaintiff to communicate on the website, and specific topics of discussion, as listed in paragraph 6 of this complaint. The letter also indicated that FBI should not only search its main index, but also for all files indexed in other ways, such as "see references", numbered and lettered sub files, "DO NOT FILE" files, control files, and ELSUR (Electronic Surveillance) files. The letter also stated that plaintiff would like copies of the indexing materials themselves; i.e. "see reference" cards, abstracts, etc.

9. By form of letter to attorney for the plaintiff, dated April 28, 2006, FBI acknowledged receipt of plaintiff's appeal.
10. By form of letter to attorney for the plaintiff, dated June 27, 2007, FBI denied plaintiff's appeal, affirming the FBI's initial finding of no records responsive in its automated indices. The letter proceeded to inform attorney to the plaintiff, that as a courtesy to him, FBI had conducted a search of its Electronic Surveillance (ELSUR) database, and had found no records responsive to plaintiff's request. FBI also suggested that attorney for the plaintiff file a new FOIA request directly to the Washington Metropolitan Field Office, citing 28 C.F.R. § 16.3 (a), 16.41(a) (2006).
11. By recorded telephone conversation on August 9, 2007, which will be furnished in its entirety to the court, acting FBI FOIA officer Debbie Lopes informed plaintiff that, in stark contradiction to FBI's written affidavit, all FBI field offices had been searched upon initial review of appeal. Ms. Lopes further indicated that it was this search, which

prompted the determination in FBI's denial of appeal. After plaintiff attempted to verify this fact for the record, Ms. Lopes then contradicted her own statement. She declared that the appeal file showed the search of all FBI field offices had actually only taken place in July of 2007, after a previous telephone conversation between plaintiff and Ms. Lopes. Plaintiff then referenced that previous conversation, and reminded Ms. Lopes that she had also clearly indicated at the beginning of that call that FBI field offices had already been searched. Ms. Lopes then strangely agreed, again contradicting her statement of a few seconds earlier, and explaining that as a matter of procedure, all field office and cross-referenced files were searched in response to plaintiff's appeal. Plaintiff then attempted to verify if all relevant information cited in that April 13, 2006 appeal letter had been searched in conjunction with plaintiff's name. Ms. Lopes then informed plaintiff that she needed to consult with FBI's appeal attorney.

12. By form of letter to plaintiff dated February 23, 2006, CIA acknowledged receipt of plaintiff's FOIA request.
13. By form of letter to plaintiff dated March 7, 2006, CIA denied locating any CIA-originated records or information. Notification of entitlement to appeal was included in the letter.
14. By letter dated April 13, 2006, attorney for the plaintiff appealed the CIA's response, citing all available information necessary to locate plaintiff's records, including: name of the website, all aliases used by plaintiff to communicate on the website, and specific topics of discussion, as listed in paragraph 6 of this complaint. The letter also indicated

that in accepting plaintiff's initial FOIA request, CIA must account not only for CIA-originated records, but all records that pertain to the plaintiff, as stated in that request. The letter also indicated that should the CIA maintain records by another agency, the CIA must account for them also.

15. By form of letter dated August 9, 2006, CIA denied plaintiff's appeal, affirming the adequacy of its initial search.

First Cause of Action
(Violation of FOIA for Bad Faith)

16. Martin F. Wiesner repeats and realleges the allegations contained in paragraphs 1 through 15 above, inclusive.
17. The FBI, through the actions of its appeal attorney and FOIA officer Debbie Lopes, knowingly falsified information crucial to a fair and just due process of law.
18. As documented by recorded telephone conversation, FOIA officer Debbie Lopes clearly states that all FBI field offices were searched prior to the issuance of written denial of appeal on June 27, 2007. In that same letter, the FBI conversely suggested that plaintiff file a new request with the Washington Metropolitan Field Office. By nature of this given account of events, plaintiff can only reasonably ascertain that either:
 - FBI field offices were searched prior to issuance of denial of appeal, and the letter of denial was intentionally falsified.
 - FBI field offices were not searched, and the statements made by Ms. Lopes that field

offices were searched prior to issuance of denial of appeal, were intentionally false.

-There was some kind of serious mis-communication and/or falsification of information within FBI, rendering FBI's letter of denial of appeal to attorney for the plaintiff, falsified by default.

19. As further documented by the same recording, Ms. Lopes proceeds to correct herself, clearly referencing FBI's appeal file, stating that it showed field offices were only searched in July, 2007. Ms. Lopes then clearly states that the reason for that search was a previous telephone conversation with plaintiff in July 2007. Somehow, Ms. Lopes then contradicts herself again, agreeing that in that same July 2007 conversation, which had apparently prompted FBI's search of field offices, she indicated to plaintiff that field offices had already been searched. By nature of this given account of events, plaintiff can only reasonably ascertain that:

-Information contained in FBI's appeal file, showing that field offices were only searched in July 2007, or Ms. Lopes' account of that file was false.

-Information contained in FBI's appeal file, showing that field offices were only searched in July 2007 is correct, and Ms. Lopes' statement indicating that field offices were searched prior to issuance of written denial of appeal, which she clearly states for the recording that she remembers having made in July of 2007, was false.

20. Defendant FBI has either falsified the content of an official written determination, falsified plaintiff's appeal information by recorded phone conversation, or both. An

agency “must demonstrate ‘beyond material doubt’ that the search was reasonable.”

Truitt v. Department of State, 897 F.2d at 542.

21. Defendant’s actions are arbitrary, capricious, an abuse of discretion, and not in accordance with procedure required by law, all in violation of the APA.

Second cause of Action
(Violation of FOIA for Bad Faith and Inadequate Search)

22. Martin F. Wiesner repeats, realleges, and incorporates the allegations contained in paragraphs 1 through 15 above, inclusive.
23. It remains unclear, as a matter of record, whether FBI’s determination sent by letter was false, FBI FOIA officer’s information was false, or if both were false. In FBI’s written determination of appeal, it states that ELSUR (Electronic Surveillance) files and nothing else were searched, in accordance with plaintiff’s appeal request. At the end of the recorded conversation between FOIA officer Debbie Lopes and plaintiff, Ms. Lopes clearly states that field office and cross-referenced files were searched, in accordance with plaintiff’s appeal request. If, in fact, any action at all was taken by FBI, it must include all of the information specified in accordance with plaintiff’s appeal request—“To be sure, a request which fails to ‘reasonably describe’ the documents sought does trigger a search of agency records. When, however, an agency becomes reasonably clear as to the materials desired, FOIA’s text and legislative history make plain the agency’s obligation to bring them forth.” *Truitt*, F.2d 540.
24. Defendant FBI’s actions constitute agency action unlawfully withheld or unreasonably

delayed, in violation of the APA. Defendants actions are arbitrary, capricious, an abuse of discretion, and not in accordance with procedure required by law, all in violation of the APA.

Third Cause of Action
(Violation of FOIA for Inadequate Search)

25. In responding to plaintiff's FOIA request, by form of letter dated February 23, 2006, CIA indicates:

“We have accepted your request and will process it according to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, and the Privacy Act of 1974, 5 U.S.C. § 552a. Unless you object, we will search for CIA-originated records existing through the date of this acceptance letter.”

In stating that plaintiff's request was accepted, CIA accepts the burden of proof to conduct an adequate search for all records pertaining to plaintiff. Plaintiff bore no objection to the statement that CIA would search for CIA-originated files, however, CIA's response stating that only CIA-originated files were searched, is inconsistent with the agency's legal responsibility to search all of the information as stated, and accepted in plaintiff's request. *See McGehee v. CIA*, 697 F.2d 1095 (C.A.D.C. 1983).

26. Defendant CIA's actions constitute agency action unlawfully withheld or unreasonably delayed, in violation of the APA. Defendants actions are arbitrary, capricious, an abuse of discretion, and not in accordance with procedure required by law, all in violation of the APA.

Plaintiff's Request To The Court

27. As it stands, in record of fact, through written materials and recorded audio material, the FBI's actions are improper, unlawful, and in direct violation of FOIA. The burden of proof beset upon government agencies, which requires the processing of the FOIA to be conducted in good faith, exists only under the presumption that the process is truthful and legitimate. The evidence presented to the court by plaintiff indicates that the actions taken by FBI, as accounted for by the FBI, are inconsistent, contradictory, at times flagrantly dishonest, and as a result, purely hypothetical. If the FBI can present to the court, and to the plaintiff, that their actions were in some way legitimate, then it must clarify those actions, as a matter of record.

As the law of this circuit has held, a specific goal of the FOIA is to "give citizens access to the information on the basis of which government agencies make their decisions, thereby equipping the populace to evaluate and criticize those decisions. Each of these objectives-and particularly the last-would be best promoted by a rule that all records in an agency's possession, whether created by the agency itself or by other bodies covered by the Act, constitute 'agency records'." *McGehee*, 697 F.2d 1095. With respect to this finding, and in light of the existence of coordination between FBI and CIA on many levels, plaintiff requests an equal standard of review with regards to defendant CIA.

Requested Relief

WHEREFORE, plaintiff prays that this Court:

- A. Order defendants to produce the requested records in their entireties, and make copies available to plaintiff.
- B. Order defendant FBI to produce a definitive and truthful record of their actions regarding plaintiff's request.
- C. Make a written finding that the circumstances surrounding the withholding raise questions whether there has been arbitrary or capricious agency action, and make a referral to the Special Counsel for investigation, pursuant to 5 U.S.C. § 552(a)(4)(F).
- D. Award plaintiff its costs and reasonable attorneys fees incurred in this action.
- F. Provide for expeditious proceedings in this action.
- E. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,



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